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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 97

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THOMAS W. DANT, ET AL., Co-Partners d/b/a DANT & RUSSELL, LTD., *Respondents*.

BRIEF FOR THE RESPONDENTS

R. S. SMETHURST
R. S. HASLAM
Washington, D. C.

JOHN T. CASEY
R. E. KRIESIEN
CASEY, KRIESIEN & PALMER
Portland, Oregon
Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 195 F. 2d 299 (R. 588-590). The findings, conclusions, and orders of the Board (R. 6-38, 50-56, 59-60) are reported at 92 NLRB 307, and 95 NLRB 252.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended. The decision and decree of the Court of Appeals was entered on March 20, 1952 (R. 588-591). The petition for a writ of certiorari was granted on October 13, 1952.

QUESTIONS PRESENTED

An unfair labor practice charge was filed by a local CIO union when the officers of the CIO had failed to file non-Communist affidavits as required by Section 9(h) of the National Labor Relations Act, as amended. Such prescribed affidavits were filed by said officers before the complaint was issued based on the local union's charge. The questions presented are (1) whether a union is empowered to file a valid charge when its officers are not in compliance with Section 9(h), and (2) whether the Board is authorized to take any action with respect to such a charge.

STATUTE INVOLVED

The statutory provision directly involved herein is Section 9(h) of the National Labor Relations Act, as amended, hereinafter referred to as the Labor Management Relations Act, 1947, or the "Act" (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*). This provision of the statute and other relevant parts thereof are set out in the Appendix hereto.

STATEMENT

On July 18, 1949, the Company (Respondents' herein) discharged two employees for loafing during the preceding three consecutive workdays (R. 21, 22, 71, 183, 432, 569). On August 3, 1949, International Woodworkers of America, Local 6-7, CIO, the recognized bargaining agent for the Company's employees, filed a charge with the Board alleging that the discharges violated Section 8(a)(1) and (3) of the Act (R. 6-7). When this charge was filed the officers of the CIO had not executed and filed non-Communist affidavits as required by Section 9(h) of the Act. The CIO officers did not file the non-Communist affidavits until December 22, 1949. During the interval, as the record indicates, the Board had invoked the processes of the Act on behalf of the charging union by investigating its charge (See R. 569).

On or about March 27, 1950, the General Counsel on behalf of the Board issued a complaint based on the charge filed on

August 3, 1949 when the union was not in compliance with Section 9(h). The customary proceedings were then conducted by the Board. On November 29, 1950 the Board issued its decision and order. (R. 6-38).

On June 6, 1951 the Company moved the Board to reconsider its decision and order on the grounds, among others, that the union was not in compliance with Section 9(h) of the Act when the charge was filed with and accepted by the Board (R. 57-59). This motion was denied by the Board on July 17, 1951 (R. 59-60). In the interval, on June 20, 1951, before it acted upon the Company's motion for reconsideration of its decision and order, the Board petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its decision and order (R. 575-584).

The United States Court of Appeals for the Ninth Circuit as the record shows, did not consider the merits of the Board's findings and made no determination of the question as to whether the employees had been discharged for loafing as the Company has always contended. Instead, the Court below set aside the Board's order on the ground that "the Board was not empowered to entertain the charge or to issue the complaint or order" by reason of Section 9(h) of the Act.

SUMMARY OF ARGUMENT

I.

The explicit language of Section 9(h) considered in its context, requires unions (labor organizations) to file non-Communist affidavits as a condition precedent to their filing of valid petitions in representation matters, or valid charges in unfair labor practice cases. This Section deprives the Board of power to *process* any petition or charge filed with it by a non-complying union. Accordingly, Section 9(h) precludes non-complying unions from filing *valid* charges, and prohibits the Board from taking any action on a charge filed by a non-complying union.

II.

The legislative history of Section 9(h) and the related "filing requirement" sections of the Act establish beyond question that Congress intended that compliance therewith was to be a *prerequisite* to the filing of a valid charge by a union, as well as to the power of the Board to assert jurisdiction over a union charge. The legislative history record is consistent and leaves no question for doubt as to Congressional intent.

III.

The National Labor Relations Board, in its formal Rules and Regulations and in its Statements of Procedure has always interpreted Section 9(h) in complete conformity with the interpretation herein urged by Respondents and adopted by the Court below.

IV.

All lower Federal Court decisions attach the same significance and effect to Section 9(h) as is urged by Respondents herein. Further, this Court has previously decided the issue raised by the Board herein and has made it clear that Section 9(h) of the Act denies to non-complying unions the right to file *valid* petitions or charges with the Board, and deprives the Board of any authority it may otherwise have to process in any manner a petition or charge filed by a non-complying union.

I

ARGUMENT

The Content and Context of the Filing Requirement Sections of the Act Support the Conclusions of Respondents That Compliance With Section 9(h) Is a Condition Precedent to the Filing of a Valid Charge by a Union

Section 9(h) is one of three sections in the Act requiring specific affirmative acts by labor organizations as conditions precedent to their utilization of the Act's procedures and processes.

Section 9(f) requires the filing of certain organizational and financial data. Section 9(g) requires that the data filed under 9(f) must be kept current and must be furnished annually to members of the labor organization. Section 9(h) requires that non-Communist affidavits be filed and kept current.[1]

Section 9(h) provides as follows:

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the over-

[1] The operative language of Sections 9(f) and (g) relating to unfair labor practices is as follows:

9(f):

". . . no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have *prior thereto filed* [certain material] and (B) can show that *prior thereto* it has *performed* [certain acts]."

9(g):

". . . no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit *has complied with its obligation* under this subsection."

throw of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."[2]

Considered reading of this section compels the conclusion that it was and is designed and intended to deprive the Board of jurisdiction to take any action upon *petitions* or *charges* filed by non-complying labor organizations. As a corollary, of course, the section deprives non-complying unions of the right available to complying unions to have petitions or charges *processed* by the Board.[3]

The language of Section 9(h) establishes beyond question that the Congress was fully aware that the processes of the Act could not be invoked even by a complying labor organization unless that organization filed with the Board (1) a petition in the case of a representation or union shop matter; or (2) a charge in a matter involving alleged unfair labor practices. And it was this right to file a valid petition or charge that Congress intended to restrict.

For a union to be eligible to invoke the Act's processes and set the Board's machinery in motion, Section 9(h)

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[2] This Section specifically embodies terms used to describe Board actions authorized in other sections. In composite, the section clearly prohibits the Board from taking any action to start the processes of the Act on a petition or charge filed by a non-complying union.

We do not suggest that the section precludes the Board from *receiving* petitions or charges from non-complying unions. We do urge, however, that this Section prohibits the Board from granting *any benefits* made available by the Act to non-complying unions. In unfair labor practice cases pronounced benefits result from a Board investigation. Such an action, we submit, is prohibited by Section 9(h) if the union was not in compliance with this Section when the *charge* was filed.

[3] The Board itself has taken the position that the acceptance and investigation of a charge are as much a part of the Act's processes as are the issuance of a complaint and subsequent proceedings. See *NLRB* v. *Wiltse*, C. A. 6, 188 F. 2d 917. In the cited decision the Court of Appeals agreed with that view which accords with that advanced by the Respondents herein.

provides clearly that non-Communist affidavits must be filed "contemporaneously" with the request for the Board's assistance. In the alternative, such affidavits must have been filed within the preceding 12-month period. To interpret the statutory language of Section 9(h) in any other way would read out of that section the time limitation provision contained in it. Certainly, it cannot be questioned that the Board's interpretation in this case, e.g.—that the time limitation as applied to unfair labor practice matters relates to the date of the Board's complaint—reads out of the section the term "contemporaneously."

It is the contention of Respondents that Section 9(h) means this: No action whatever may be taken by the Board on any *petition* or any *charge* of unfair labor practices presented or filed by a labor organization unless the officers of that organization and the defined affiliates have complied with Section 9(h) *on or before* the date when the *petition* or *charge* is filed.

To support this position, the Court's attention is respectfully directed to the actions the Board is empowered to take under Sections 9(c), 9(e) and 10(b), all of which are restricted by Section 9(h) prohibitions.

Section 9(c) provides that whenever a petition is filed "the Board shall investigate" it and take further steps if the investigation reveals cause therefor. *Section 9(e)* provides that whenever a labor organization files a "union shop" petition and makes an appropriate showing, then "the Board shall . . . take a secret ballot of such employees, and shall certify the results thereof" to the union and the employer. *Section 10(b)* provides that when it is charged that unfair labor practices had been or are being committed, "the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges . . ."

The very language of Section 9(h), we submit, deprives the Board of any authority whatsoever to act on union petitions or charges unless the union is in compliance with

that section when the petition or charge is filed with the Board. This section explicitly precludes the Board from taking the first action otherwise permissible on petitions or charges filed by complying unions.

In the case of representation petitions, Section 9(c) provides that the Board must *investigate*. This is the first step to be taken by the Board. However, Section 9(h) deprives the Board of authority to proceed with the investigation unless the union is eligible to have the petition investigated by compliance with Section 9(h).

In the case of 9(e) petitions, the Board is compelled to conduct an election upon an appropriate showing by the union. But when 9(e) cases were affected by Section 9(h) prohibitions, the Board was expressly precluded from conducting an election (entertaining the petition).[4] These prohibitions of Section 9(h) as they relate to the authority of the Board to proceed with union shop petitions, we submit, establishes beyond question the intent and application of the time limitations feature on filing non-Communist affidavits. The limitation means that "unless there is on file with the Board an affidavit executed contemporaneously with [the petition] or within the preceding 12-month period", then the Board is wholly without authority to do anything with the petition.[5]

As in representation petition cases, (involving 9(c) proceedings) the language of Section 9(h) deprives the Board of any authority to take the action specifically authorized by Section 10(b) unless the charging labor organization is in compliance when it seeks the assistance of the Board. While Section 9(h) identifies a "complaint", it is clear that

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[4] We recognize that Section 9(h) restrictions no longer apply to union shop petitions. Nevertheless, we contend that the 9(h) restrictions as they did apply to union shop petitions have a direct bearing upon the matters here under consideration.

[5] This portion of Section 9(h) demonstrates as clearly as possible that the Section was designed to prohibit the Board from taking any action whatsoever on a presentation of a charge by a non-complying union.

in the context utilized by Congress, the intent with respect to Board action on a charge or a petition was the same—namely that the Board had no authority to process the charge or petition unless the union was in compliance with Section 9(h).[6]

There can be no question about the fact that the explicit prohibition against Board action in 9(c) and 10(b) cases referred to the first possible action the Board was empowered to take under the explicit statutory language. Further, there can be no question but that the time limitation clause deprived the Board of any jurisdiction to do anything with a union shop election petition unless there was compliance when the petition was filed. In this context, we respectfully submit that the time limitation clause was and is clearly related to the time when the union seeks to invoke the processes of the Act and that the clause applies with equal vigor to each proceeding mentioned in Section 9(h). If compliance is not present when the union seeks Board assistance, Section 9(h) precludes the Board from doing anything whatever with the petition or charge. We further submit, that if the Board does process a petition or a charge filed when the union is not in compliance as was the case here, then any Board certification, or Board order is a nullity, and must be set aside.

Respondents are well aware of the Board's position that the "grammatical symmetry" of Section 9(h) compels the conclusion that the time limitation clause—"unless there is on file . . . contemporaneously or within the preceding twelve-month period"—applies differently to the three types of proceedings mentioned in Section 9(h). This posi-

[6] There can be no argument about the fact that Section 9(h) prohibits the Board from taking the first authorized action in 9(c) and 9(e) matters, which prohibitions preclude it from taking *any action* in these matters on behalf of non-complying unions. Further, it cannot be disputed that in these cases, Congress imposed prohibitions on the Board in reference to procedural steps the Congress had identified in other sections.

tion, we have demonstrated, disregards the cohesive character of Section 9(h), and its clearly expressed intent.[7]

The prohibitions against Board action in cases of non-complying unions contained in Sections 9(f) and 9(g) are, Respondents contend, *identical* in purpose to those in 9(h). Under Sections 9(f) and 9(g) the Board is precluded from taking any action on petitions or charges unless the petitioning or charging union has complied with the filing requirements "prior" to the filing of the petition or charge with the Board. To attach any other significance to these sections as does the Board is to disregard their clear language and their common sense meaning.

Further, and in particular reference to Section 9(h), as was noted in respondents' brief in opposition to the petition for writ of certiorari, to adopt the Board's construction would

> "(a) Require or promote the use of impractical, expensive and wasteful procedures entailing a thorough investigation and processing of all charges filed by non-complying unions, without any requirement, or even assurance that the charging union would ever come into compliance, and thereby empower the Board to further proceed, in proper cases. A necessary corollary of such an interpretation is that non-complying unions could dictate commencement of such procedures, and then aid or prevent consummation of them, as their own desires or caprice might dictate.
>
> "(b) Compel a complete disregard of the conflict between
>
> (1) an alleged right to execute the non-Communist affidavits *contemporaneously* with the issuance of the complaint, and

[7] The "grammatical symmetry" argument of the Board blots out from Section 9(h) the practical, real, and intended effect of the time limitation clause contained therein as applied to a charge. Further, the Board's construction disregards the clearly expressed policy of the legislation. See *U. S.* v. *American Trucking*, 310 U. S. 534.

(2) the statutory requirement that the non-Communist affidavits must already be "*on file*" at the time of the issuance of the complaint.

"(c) Require approval of an arrangement or political alliance between Governmental representatives, and the leaders of non-complying unions which would thwart the purposes of the Act."[8]

Respondents respectfully submit that the unrealistic construction of Section 9(h), as urged by the Board, would result in the highly expensive and wasteful procedures under which investigations would be made on charges filed by non-complying unions with the Board being helpless to further proceed in event of continuing non-compliance. Further, respondents submit that the Board's interpretation permits it to provide non-complying unions with very substantial benefits under the Act without any assurance of compliance by them. In this connection, it must be recognized that the Board's investigation of any unfair labor practice charge, results in the charging union forthwith obtaining the highly advantageous position of having on its side the full power of the Federal Government. Further, as the Board admits in its Brief, a large majority of unfair labor practice charges are disposed of by the Board during the investigation. (See Board's Brief, page 12, footnote 6.) Under the Board's construction of Section 9(h), non-complying unions could receive substantial benefits through the process of investigation and stipulated settlements. Such a result is so clearly in conflict with the intent of Section 9(h) as to make the Board's interpretation incongruous.

In the instant case, the Board clearly made available to the non-complying union the benefits of the Act since it appears the Board's investigation was started as early as August 16, 1949. (See General Counsel's Ex. 2, R. 569).

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[8] Brief of Respondents in opposition to petition for Writ of Certiorari, page 3.

Had the Respondents been less certain of their position that the employees were discharged for good cause, and not in violation of the Act, it is entirely possible that the Board could have given the union all needed benefits of the Act by obtaining reinstatement of the workers during the investigation.

It must be apparent from the foregoing that under the Board's interpretation of Section 9(h), in many cases, a non-complying union could obtain a major part of the Act's benefits when it filed an unfair labor practice charge. This result, we submit, is directly prohibited by the language of Section 9(h), and as will be shown, is in conflict with the declared intent of Congress.

II

The Legislative History of Section 9(h) and Related Sections Compels the Interpretation Adopted by the Court Below

As mentioned earlier, Sections 9(f), 9(g), and 9(h) of the Act have a common legislative history. All were intended to have the same consequences. Thus, all must be construed together. The legislative history of these sections establishes beyond question that it was the undisputed intent of Congress that compliance with Section 9(h) was to be a *prerequisite* to the filing of a valid charge by a union; and that the Board was to have no jurisdiction whatever over invalid charges.

The Board, in its brief seeks to discount all phases of legislative history because it asserts that resort to the legislative history is unnecessary.

We do not contend here that it is necessary for this Court to base its judgment on the legislative history of Section 9(h), because we believe the language of this section and other sections prove the accuracy of our interpretation of Section 9(h). In view of the Board's position, however, we think examination of the legislative history highly appropriate here. We submit that the legislative history of Section 9(f), (g) and (h) proves conclusively that no

union is entitled to invoke the processes under Section 10(b) of the Act unless that union is in compliance with Section 9(h) when the charge of unfair labor practices is filed. Authoritative statements contained in Committee Reports, and from sponsors of the Act all indicate a clear intention to prevent unions from having any *petition* or *charge* processed (acted upon in any way) unless the union was in compliance with Section 9(h) when the petition or charge was filed.

The Conference Report, House Rept. 510, 80th Cong., 1st Sess., which accompanied H. R. 3020, the bill enacted as the Labor Management Relations Act, 1947, states at pages 51 and 52, as follows:

> "The conference agreement (sec. 9(f) and (g) adopts the provisions of the Senate amendment with three changes therein. *First*, the filing of the information and reports is made a condition of eligibility for requesting a union shop election, *in addition to eligibility for filing petitions for representation and eligibility for making charges. Second*, it is provided that not only the particular labor organization *invoking the processes of the act*, but also any national or international labor organization of which it is an affiliate or constituent unit, must *file the required information and reports.* (Emphasis added)

From the foregoing excerpt from the Conference Report, it is clear that the Conference agreement more nearly followed provisions originally embodied in the Senate Bill, S. 1126. The Senate Report, No. 105, 80th Cong. 1st Sess., at page 26, describes the effect of section 9(f) as contained in that Bill. It states:

> "Section 9(f): This requires labor organizations to file certain information and financial reports with the Secretary of Labor *in order to be eligible for certification or have charges processed in their behalf.* (Emphasis added).

That there was no question about the intent of the filing requirement section of S. 1126 is further revealed by the

statements of the minority of the Senate Committee on Labor and Public Welfare. The report of "Minority Views", Senate Rept. 105, Part 2, 80th Cong., 1st Sess., which also accompanied S. 1126, contains the following statement at page 22:

> "Sections 9(g) and (h) of the bill would require unions to file, both annually with the Secretary of Labor *and as a prerequisite to each initiation of a representation investigation or unfair labor practice proceeding against an employer*, extensive and detailed reports on their financial affairs and other activities, such as manner and mode of elections, initiation fees, and dues, and to furnish such financial reports to their members. The effect of these provisions is to encourage resort to self-help by unions instead of encouraging them to resort to the procedures provided by the Act. This is an inevitable result of erecting these additional obstacles to *securing the relief the Act is designed to provide.*" (Emphasis added).[9]

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[9] See also statements of Senators Morse and Murray who were both thoroughly familiar with the content and purposes of the filing requirement sections.

Senator Morse, at 93 Cong. Record 6452, while directing his attention to section 9(f)(6) stated as follows:

> "* * * Employers will be quick to make such allegations because *full compliance is made a condition precedent to the Board's jurisdiction for all purposes.*" (Emphasis added.)

Senator Morse further stated at 93 Cong. Record 6455, that

> "My next objection related to the so-called anti-communist provisions of the bill. * * * Under the terms of the bill, however, every *local union will be denied all access to the peaceful machinery of the Act if it has an officer*, or if its parent body has an officer a Communist or Communist sympathizer, in fact or alleged." (Emphasis added.)

Senator Murray at 93 Congressional Record 6497, while according consideration to Section 9(h) made the following pertinent comment:

> "Another respect in which the conferees have worsened the measure by making resort to the peaceful processes of the government difficult is found in the provision of Section 9(h) dealing with the Communist issue. * * * Here again if a labor

Declarations by co-authors of the Act during the Congressional debates did not deviate from these understood purposes of the sections. On at least two occasions, Senator Taft described the character of the compliance requirement of Section 9(f) in a manner that cannot be misunderstood.

At 93 Cong. Rec. 3955, the following statement by Senator Taft respecting Section 9(f) appears:

> "Mr. President the bill provides that Unions must file financial reports on forms certified by the Secretary of Labor * * *.
>
> "The filing of such reports is a condition of certification as a bargaining agent under the law, and is also *a condition of the right to file any charges under the National Labor Relations Act.* (Emphasis added).

Later, Senator Taft had included in the Congressional Record an analysis of the various provisions of the Act. His statement concerning Sections 9(f) and (g) appears at 93 Cong. Rec. 6602, as follows:

> "Subsection 9(f) and Subsection 9(g) requiring that labor organizations *as a condition precedent to* be recognized as representatives under Section 9 or *being permitted to file charges under Section 10* must file certain information with the Secretary of Labor and furnish financial reports to their members, differs from the corresponding subsection in the Senate amendments only with respect to 9(f) (sic)." (Emphasis added)

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organization has a Communist officer, *the right of the Union to seek the processes of the Board is gone* * * *" (Emphasis added.)

Senator Murray further stated at 93 Congressional Record 6499 as follows:

> "Mr. President, I have already adverted to the burdensome registration requirements which Unions are compelled to comply with *as a condition precedent to seeking the dubious privilege of resort to the machinery of the National Labor Relations Act, as amended.* * * *" (Emphasis added.)

Section 9(h) of the Act was drafted after Sections 9(f) and (g). Its language is similar to Sections 9(f) and 9(g); and its purposes are equally clear.[10] In light of the legislative history of Sections 9(f) and (g), we submit that the Congress intended the same consequences to result from non-compliance with Section 9(h) as those resulting from non-compliance with Sections 9(f) and (g) upon which Section 9(h) was patterned. Accordingly, the conclusion is inescapable that Congress intended compliance with Section 9(h) was to be a prerequisite to any filing of a valid charge by a union. The Congress further intended, it is clear, that the Board should be without authority to take any action whatever on a charge filed by a non-complying union. These conclusions are fully supported by additional portions of the legislative history.

To illustrate, on June 4, 1947 Congressman Hartley explained the intended application of Section 9(h) when he said:

> "The Bill further *prohibits labor organizations from invoking the processes of the Act* unless all of the officers file affidavits with the Board that they are not members of the Communist party or other subversive organizations." (Emphasis added). (93 Cong Rec. 6540)[11]

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[10] See footnote 1, *supra*.

[11] In a subsequent statement, Congressman Hartley reemphasized that it was the intention of the Congress that the processes of the Board could not be started by non-complying unions. Shortly after the Board's decision in the *Northern Virginia Broadcasters, Inc.* case, (1947) 75 NLRB 11, he had published a book entitled "Our New National Labor Policy", Funk and Wagnalls Company. Therein, at pp. 162 and 163, he said:

> "Lest there be any doubt as to what we meant when we wrote that section, I want to put down here exactly what I had in mind and also report that not a single member of the House Labor Committee or the Joint House Senate Conference Committee ever indicated that it meant anything else.
>
> "I meant that no Local Union could petition for an election *or file an unfair labor practice charge*, unless the officer of that Local and the officers of the international union and the

Later, on June 12, 1947, when the Conference Report was under consideration by the Senate, Senator Taft made it absolutely plain that union compliance with Section 9(h) was to be a condition precedent to that union's ability to invoke the Act's processes. He said:

> "This provision, making the filing of affidavits with respect to Communist Party affiliation by its officers *a condition precedent to the use of the processes of the Board* has been criticized as creating endless delays. (Emphasis added). 93 Cong Rec. 7002.

In light of the foregoing, it is respectfully submitted that there can be no question of Congressional intent respecting the effect of Sections 9(f), (g) and (h). The legislative history of these sections establishes beyond doubt that Congress intended to deprive non-complying unions of any and all benefits afforded by the Act, and at the same time to deprive the Board of jurisdiction to take *any action* on petitions or charges filed by non-complying unions.

In attempted answers to these clear declarations of Congressional intent, the Board suggests that by failing to specifically repudiate by legislation the Board's interpretation of Section 9(h), the Congress has approved of that interpretation.

Respondents submit that these suggestions of the Board are wholly without merit. Certainly, as has been shown, the expressions establishing Congressional intent have been

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officers of whichever of the two major labor organizations the international was affiliated with, had filed non-Communist affidavits * * *.

"The National Labor Relations Board ruled differently. In a decision remarkable for its twisted logic, the Board held that the officials of the AFL and CIO national officers were not officers of an 'affiliated organization.' As a result, the two national labor organizations we wanted most to reach were beyond reach of the law we wrote for that purpose. * * *

"*I would not be so concerned over this particular decision if it were not for the precedent it established for circumventing the clear intent of the Congress.*" (Emphasis added.)

continuous and consistent. Even at late as 1950, when the Senate was considering an NLRB reorganization plan, Senator Ellender, a member of the Senate Committee which considered the bill, and one of the conferees who signed the Conference Report, declared with respect to Section 9(h):

> "One of the major provisions in the Taft-Hartley Act is the section which *denies the facilities of the Labor Board* to labor organizations or any organizations affiliated with them *unless all the officers file affidavits* disclaiming membership in or sympathy with the Communist Party." (Emphasis added.) (96 Cong. Rec. 6955, May 11, 1950.)

The second "answer" of the Board to the unequivocal legislative history of Section 9(h) is equally untenable. As this Court is well aware, the Congress, as a consistent policy, relies upon the courts to interpret the laws it enacts. As a general rule, therefore, the Congress awaits court interpretations before amending statutes to more clearly express Congressional intent. Until the Courts have acted, there is no real occasion for Congress to consider or act upon an agency's construction of any given statute it may be charged with administering or enforcing. Actually, therefore, a more plausible explanation of the inaction of Congress respecting the Board's interpretation of Section 9(h) is that the Congress believed the courts had repudiated the Board' interpretation of Section 9(h).[12]

The two occasions when Congress considered amendments to the act which are cited by the Board to support its view that Congressional inaction on Section 9(h) constitutes approval by Congress of the Board's interpretation of that Section, are totally insufficient. In the one instance, the Congress was dealing solely with the union shop problem which resulted in enactment of Public Law 189, 82nd Cong., 1st Sess. This law was designed and intended only to pre-

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[12] See NLRB v. Highland Park Manufacturing Co., C. A. 4, 1950, 184 F. 2d 98; NLRB v. Postex Cotton Mills, C. A. 5, 1950, 181 F. 2d 919.

vent what Congress regarded as unnecessary expenditures by Government.[13] On the other occasion when amendments to the Act were considered by Congress in 1949, (S. 249, 81st Cong. 1st Sess.), the Senate passed several amendments, but these were never acted upon by the House of Representatives. Thus, the intent of the Congress as indicated by its inaction on the 1949 amendments amounts to sheer speculation.

III

The National Labor Relations Board's Formal Construction of Section 9(h) Supports the Respondent's Position Herein and the Court of Appeals Decision

The position asserted by the Board in this case is in direct conflict with its own formal administrative rules, regulations and practices. From the very inception of the

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[13] The specific suggestion of the Board that the failure of Congress to incorporate certain recommendations of the Joint Committee on the Labor Management Relations Act in Public Law 189, 82nd Cong. is without merit. It is absolutely clear from the report accompanying that bill that Congress was merely interested in preventing unnecessary expenditures of money by the Board to repeat certain elections conducted prior to the *Highland Park* decision. See House Rept. 1082, 82nd Cong. 1st Sess., page 2, reading in part as follows:

> "The purposes of the Bill are (1) to resolve problems arising from a recent Supreme Court decision, National Labor Relations Board vs. Highland Park Manufacturing Company and * * *."
>
> "It is estimated that the Bill will achieve economies in excess of $1,000,000.00. The General Counsel of the National Labor Relations Board has stated that to repeat the election affected by the Highland Park decision would involve polling approximately 1,470,000 voters in Union Shop cases at an estimated cost of $735,000.00 and approximately 370,000 voters in representation cases at an estimated cost of $135,500.00. In addition the General Counsel estimates that approximately $200,000.00 might have to be spent on the conduct of investigations and litigations in complaint cases which might arise from upsetting existing certificates. The funds for these purposes are not provided in the Board's current appropriation * * *."

Act, the Board, in its formal rules and regulations, has interpreted the wording of the Act and the clear intent of Congress in a manner practically the same as the Court below. Stated differently, the formal rules of the Board have consistently required, by their terms, that there must be compliance with Sections 9(f), (g) and (h) of the Act at the time the charge is filed. See section 203.13 of the Board's Rules and Regulations, Series 5, and section 202.3 of its Statements of Procedure, effective August 23, 1947.[14] These rules and procedures were the first promulgated under the amended Act. They provided as follows:

> "203.13 : Compliance with Section 9(f), (g) and (h) of the Act:
>
> (b) For the purpose of these rules and regulations, compliance with section 9(h) of the act means that a national and an international labor organization has on file with the General Counsel in Washington, D. C. and a local labor organization has on file with the Regional Director in the region in which the proceeding is pending:
>
> (1) *An affidavit* by an authorized representative of the labor organization, under oath, *executed contemporaneously with the charge* or within the preceding 12-month period, listing the titles of all offices . . .
>
> (2) *An affidavit* by each officer referred to in paragraph (1) of this paragraph, *executed contemporaneously with the charge* or within the preceding 12-month period, stating that he is not a member of the Communist party . . ." (Emphasis added).
>
> "202.3 *Compliance with Section 9(f), (g) and (h) of the Act:*

[14] The non-Communist Affidavit Form required to be executed by officers of unions, NLRB Form 1081, contains the following significant statement in the instructions for use:

> "Who Must File—This affidavit must be filed by each officer of a labor organization *before that organization may receive the help of* the National Labor Relations Board." (Emphasis added.)

If the charge is filed by a labor organization, that labor organization must present either *with the charge* or within a reasonable period not to exceed 10 days thereafter (evidence of compliance with 9(f) and (g)). In addition the labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9(h) of the act by filing with the General Counsel of the Board in Washington, D. C. either *with the charge* or within a reasonable period not to exceed 10 days thereafter . . ." (Emphasis added).

The same requirements have been contained in the Board's Rules and Regulations and its Statements of Procedure at all times since the adoption of the quoted rules and statements and in substantially the same language. These requirements are currently set out in Section 102.13 of Rules and Regulations, Series 6, and Section 101.3 of Statements of Procedure, effective March 1, 1951.[15]

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[15] Current Rules of the Board read as follows:

Section 102.13 . . .

"(b) For the purpose of these Rules and Regulations, compliance with section 9(h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A *declaration* by an authorized representative of the labor organization, *executed contemporaneously with the charge (or petition) or within the preceding 12-month period*, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An *affidavit* by each officer referred to in subparagraph (1) of this paragraph, *executed contemporaneously with the charge (or petition) or within the preceding 12-month period*, stating that he is not a member of the Com-

Although Respondents do not concede the reasonableness or validity of the Board's ten-day rule, Respondents do submit that the formal rules of the Board are more nearly in accord with Section 9(h) of the Act. In this case charges were filed on August 3, 1949, but the C. I. O. affiliate was not in compliance until December 22, 1949. We earnestly contend that by failing to follow its rules at the time the proceeding in the instant case was initiated by the charge, the Board violated not only Section 9(h) of the Act but also failed to conform to the Administrative Procedure Act

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munist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

"Sec. 101.3 *Compliance with section 9(f), (g), and (h) of the act.*—If a charge (or petition) is filed by a labor organization, that labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9(f), (b) (2) of the act. *At the time of filing the charge (or petition) or prior thereto*, or within a reasonable period of time thereafter not to exceed 10 days, the labor organization must present the duplicate copy of a letter from the United States Department of Labor showing that it has filed the material required under section 9(f) and (g) of the act and a declaration executed by an authorized agent stating the labor organization has complied with section 9(f) (b) (2) and setting forth the method by which compliance was made." (Emphasis added.)

* * * *

In the *Matter of Isaac Andrews*, 87 N. L. R. B. No. 62 (1949), the Board seemingly followed its rules. In that decision, it said:

"* * * By Section 9(h) Congress hoped to purge Communists from the labor movement * * *.

"* * * Nor do we believe that the Union's subsequent compliance cured the effects of it's non-compliance which existed at the time of its request to bargain. *The Act does not state, nor may it be implied that the Board should give retroactive effect to the Union's compliance.* * * * *We do not believe that Congress intended the Board to extend retroactive protection to those organizations, which have thus thwarted an established public policy.*" (Emphasis added.)

(60 Stat. 237, 5 U. S. C. Sec. 1001, *et seq.*),[16] and that on that ground alone this Court should order the complaint dismissed.

By reason of its violation of Section 9(h), Respondents contend that the Board's proceeding herein was invalid and unlawful from the very beginning, and that all orders of the Board based upon these proceedings should be declared null and void. Further, Respondents respectfully submit that by its violation of the Administrative Procedure Act, all phases of the proceeding are invalid for this additional reason, and should be declared a nullity.[17]

The Board's explanation of its failure to follow its own rules is without merit. It states that the provisions of these regulations describing the time when a union must be in compliance are provided only for purposes of those regulations. The Board then states, in effect, that despite

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[16] Section 3(a) of the Administrative Procedure Act provides in part, as follows:

> "Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations . . . *No person shall in any manner be required to resort to* organization or procedure not so published." (Emphasis added.) 5 U. S. C. § 1002(a)

The effect of Section 3 is to establish the publication requirement as a condition precedent to use by an administrative agency of procedures required to be published. By instituting the proceeding here in direct violation of its published rules, the Board acted without authority with the result that its complaint and order are invalid.

Section 10(e) of the Administrative Procedure Act, relating to scope of review, provides in part a reviewing court shall:

> " * * * (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (4) without observance of procedure required by law; * * * ".

[17] See footnote 16, *supra*.

its disregard of its own rules, the procedures followed by it accomplish the same results as if the rules were followed. It claims that as a general rule, charges and petitions filed by non-complying unions are dismissed within ten days after filing unless the union is then in compliance. Thus, it alleges that non-complying unions do not derive any benefits under the Act even though their petitions or charges are accepted by the Board.

We are without knowledge of the practices followed by the Board in the situations described. In the instant case the charges were not dismissed at the expiration of the ten-day period. Here the union did receive the benefit of a full Board investigation and succeeded in involving Respondents in legal proceedings with the Board. While the record in this case does not reveal what, if any, efforts were made by the Board to obtain voluntary reinstatement of the two discharged employees, we believe this Court can take notice of the fact that the Board does seek to settle cases before issuance of formal complaints and that these settlements do frequently benefit the union filing the charges. (Cf. Bd. br. p. 12 footnote 6). In any event, the Board's explanation cannot excuse its failure to comply with its own published rules nor can it validate proceedings not authorized by law.

IV

Judicial Determination Respecting Section 9(h) Are Not at Variance With the Court of Appeals Decision in the Instant Case, But are Fully and Consistently in Accord With That Decision

In several instances Federal courts have considered and decided the application of Section 9(h) in particular factual situations. Until recently, however, only a few of the decisions have been concerned *primarily* with the specific problem before the Court in this case. It is the respectful contention of Respondents, nevertheless, that the decision of this Court in *National Labor Relations Board* v. *Highland Park Manufacturing Company*, (341 U. S. 322, 95 L.

ed. 969) has effectively settled the questions of (1) whether a union not in compliance with Section 9(h) is empowered to file a valid charge, and (2) whether the Board is empowered to process such a charge after it is received. Decisions of several Circuit Courts of Appeal fully support this view.

In the *Highland Park* case, this Court was confronted with the specific *question of whether an order* of the National Labor Relations Board *was valid and could be enforced since it was based upon a charge filed by an affiliate of the C. I. O. whose international officers had not complied with Section 9(h) when the charge was filed.*

Without equivocation this Court held that the Board order based upon *such charge* was invalid.

In the course of its opinion, the Court emphasized that the Board's order had been challenged on the ground that the C. I. O. affiliate was *disabled from filing a valid charge* by reason of Section 9(h) and that this same section of the Act precluded the Board from entertaining the charge and from entering an order pursuant to a formal Board complaint based on the charge.

The Court said:

> "The order was challenged upon the grounds, among others, that the failure of the C. I. O. officers to file non-Communist affidavits *disabled its affiliate, the Textile Workers Union,* and the Board could not entertain *their complaint* and enter the order." (Emphasis added).

There can be no question but that the challenge to the validity of the Board's order was directed, in basic part, to the validity of the very *charge* (called "complaint" in the decision) *which started and was an integral part* of the Board's proceeding.

It might be noted here that the Board has frequently used the technical term "charge" to identify a *complaint* from a union or otherwise that unfair labor practices had been or were being committed. Further, the Board has

designated as a "complaint" the formal *charge* prepared by the General Counsel alleging that unfair labor practices had been or were being committed. In view of these technical Board usages, the Board now seeks to convince this Court that the question involved in the instant case is novel.

Respondents contend that the decision of this Court in the *Highland Park* case, *supra*, establishes beyond question that an affiliate of a non-complying national or international union cannot file a valid *charge*, as this term is used in Board parlance, even though this Court in its decision used the term "complaint" to identify a "charge" as the Board has used that term.

In the above quotation from the *Highland Park* decision, it is clear, we submit, that this Court, in using the term "complaint", referred to the "complaint" [charge] of the union; not the *formal complaint* of the Board, which *might constitute* a "complaint" in the Board's restricted terminology. If, as we contend, the Board is precluded by Section 9(h), as construed by this Court in the *Highland Park* decision, from entertaining a union "complaint" [*charge*] because of the disability of the filing union, the Board cannot acquire power to process such a charge under its technical definitions of "complaint" and "charge".

That this Court was not seeking to follow the restricted terminology of the Board in arriving at its *Highland Park* decision is supported by the following excerpt from that decision:

> "The general counsel of the Board had ruled that the Board could not entertain a *complaint* under these circumstances but the Board, with one member dissenting, overruled him, for reasons stated in Re Northern Virginia Broadcasters, Inc., 75 NLRB 11. The Court of Appeals for the District of Columbia Circuit reached the same conclusion as the Board in West Texas Utilities Co. v. National Labor Relations Board; 87 App. D. C. —, 184 F. 2d 233. The Court of Appeals for the Fourth Circuit in this case, 184 F. 2d 98, and the Court

of Appeals for the Fifth Circuit in the National Labor Relations Board v. Postex Cotton Mills, Inc., 181 F. 2d 919, arrived at a contrary result, *holding that the Board could not entertain the complaint.* The conflicting results are each so well-considered and so thoroughly documented in opinions already appearing in the books that little could be added to either. We agree with the conclusions of the Fourth and Fifth Circuits.". (Emphasis added).

The United States Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *Postex Cotton Mills* (1950), (181 F. (2d) 919 at 919-920), said:

> "There is no dispute between the parties as to Congressional purpose. It is conceded that the evil of Communist influence upon labor organizations was sought to be remedied by *denying the benefits provided by the Act* . . . to unions having Communist officers . . . . We think the language of the statute, considered in the light of Congressional purpose, the evil to be remedied, and the means provided to effectuate that purpose, evidences Congressional intent to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government." (Emphasis added.)

The Court's attention is respectfully directed to the fact that its decision in the *Highland Park* case, *supra,* not only expressed complete agreement with the Circuit Court's opinion in the *Postex* case, *supra,* but this Court also explicitly overruled the decision of the United States Court of Appeals for the District of Columbia in the case of *West Texas Utilities* v. *National Labor Relations Board* (184 F. (2d) 233). In this latter case, the Court of Appeals erroneously concluded that compliance by officers of IBEW when the charge was filed removed the *statutory disability* attached to it as an affiliate of the American Federation of Labor because the officers of the AFL were not then in

compliance with Section 9(h).[18] In addition the Court expressly adopted the conclusions of the Court of Appeals in *N.L.R.B.* v. *Highland Park Manufacturing Co.* (C.A. 4, (1950) 184 F. (2d) 98).

By its decision of agreement with the conclusions of the Fourth and Fifth Circuit Courts of Appeal, this Court ruled, it is submitted, that a *valid charge* cannot be filed by an affiliate of a non-complying "labor organization", and that the Board is precluded by Section 9(h) of the Act from entertaining or processing a charge received from a non-complying "labor organization". This is established by the Court's summation of its decision when it said:

> "*It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid.* We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." (Emphasis added).[19]

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[18] The error of the Court of Appeals for the District of Columbia in the *West Texas Utilities* case, *supra*, as to the necessity for compliance by the A. F. L., did not affect that Court's recognition of the requirements of Section 9(h) that a union cannot initiate Board proceedings unless non-Communist affidavits are filed contemporaneously with the *union's charge*, or within the preceding 12-month period. That Court said:

> ". . . the Act's only sanction for non-compliance is denial of Board facilities. Thus, if an unfair labor practice is committed by an employer, the union *may not seek Board aid* to compel him to cease and desist *unless there is on file with the Board an affidavit executed contemporaneously* or within the preceding twelve month period . . ." (Emphasis added.)

[19] In an earlier decision of this Court, Mr. Justice Frankfurter stated clearly that Section 9(h) precludes non-complying unions

Earlier in this brief, attention has been called to the fact that the Board itself, in its Rules and Regulations has construed the Act as requiring the execution of non-Communist affidavits "*contemporaneously with the charge* . . . or within the preceding twelve month period." These Rules, we submit, properly interpret Section 9(h) of the Act, and we further submit that it "would be strange indeed if the courts were compelled to enforce . . . an order which could only result from proceedings that . . . the Board was forbidden to conduct" (a) under the statute, (b) under its own Rules and Regulations, and (c) under the decision of this Court in the *Highland Park* case, *supra*.

Clearly the Court of Appeals for the Fourth Circuit in *NLRB* v. *Highland Park, supra,* determined that compliance with the requirements of Section 9(h) must exist at the time the charging union seeks to invoke the Board's assistance.

That Court said:

> "We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly

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from having any advantages under the Act. In *Communications Association* v. *Douds*, 339 U. S. 382, at pp. 416-418, he stated:

> "The central problem presented by the enactment now challenged is the power of Congress, as part of its comprehensive scheme for industrial peace, to keep Communists out of controlling positions in labor unions *as a condition to utilizing the opportunities afforded by the National Labor Relations Act*, as amended by the Labor Management Relations Act, 1947 . . . The essential question now is whether Congress may determine that membership of union officers in the Communist Party creates such an obvious hazard to the peace promoting purposes of the Act that *access to the machinery of the Act may be denied unions* which prefer their freedom to have officers who are Communists for me to say that the judgment of Congress that trade unions which are guided by officers who are committed by ties of membership of the Communist Party *must forego the advantages of the Labor Management Relations Act* is reasonably related to the accomplishment of the purposes which Congress constitutionally had a right to pursue." (Emphasis added.)

as language can that *the power of the Board may not be invoked by a labor organization unless there is on file the affidavit which the statute requires* * * *

"We see no reason to emasculate the statute by resorting to forced rules of interpretation when its language is perfectly clear and gives unqualified support to the purpose which Congress had in mind." (Emphasis added).

The Fifth Circuit Court of Appeals in *NLRB* v. *Postex Cotton Mills, supra,* reached the same conclusion. It stated:

"The other (National Labor Relations Act) imposes a restriction upon an agency provided and maintained by the government and directs that the benefits provided *shall be withheld from those who do not comply.*

"* * * The provision is pertinent though, as illustrative that Sec. 9(h) evidences no novelty in expression of congressional intent to prevent any governmental department *from being used, directly or indirectly,* to promote or sustain any organization or person who believes in the overthrow of the government of the United States by unconstitutional means." (Emphasis added).

Respondents' construction of this Court's decision in the *Highland Park* case, *supra,* is strongly supported by the decision of the U. S. Court of Appeals for the Third Circuit in the case of *NLRB* v. *Nina Dye Works, Inc.,* July 24, 1952 (198 F. 2d 363).

In the *Nina Dye* case, the Court of Appeals refused to enforce an NLRB order because the C.I.O. had not filed the documents and affidavits required by Sections 9(f), (g) and (h) of the Act until after the unfair labor practice charges were filed by a complying affiliate. After noting that the Board's action *in entertaining the charge and issuing a complaint* was "directly contrary to its own regulations", the Court of Appeals said:

"In the one reported United States Court of Appeals decision squarely in point, the Ninth Circuit held that

where the necessary non-Communist affidavits of the officers of the parent national labor organization were not on file when the particular charge was made by the affiliated local union, '* * * the Board was not empowered to entertain the charge or to issue the complaint or the order.' National Labor Relations Board v. Dant, et al., 195 F. 2d 299, 300. While the exact situation has not been passed upon to date by the Supreme Court, that Court in National Labor Relations Board v. Highland Park Manufacturing Co., 341 U. S. 322, strongly upheld the provision of section 9(h) calling for the officers of the national union with whom the charging local was affiliated to file non-Communist affidavits.

"The Fourth Circuit decision which had been affirmed in the above referred to opinion stated, 'we find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that *the power of the Board may not be invoked* by a labor organization unless there is on file the affidavits which the statute requires executed * * *.' 184 F. 2d 98, 99. (Emphasis supplied) And see National Labor Relations Board v. Postex Cotton Mills, Inc., 5 Cir. 181 F. 2d 919.

"We find no real support for the Board's present position in the citations submitted on behalf of that body. Nor do we think that there is anything helpful, as is urged, to the Board's attempted construction of 9(h) in Senator Taft's 'Supplemental Analysis of Labor Bill (Taft-Hartley Act) as passed.' Legislative History of the Labor Management Relations Act, 1947, Vol. II, p. 1625. The Senator did say that the purpose of 9(h) was to make the filing of the non-Communist affidavits '* * * a condition precedent to use of the processes of the Board * * *' but it can hardly be inferred from this that in the Senator's opinion the charge, without which no complaint can be issued, is not to be considered part of the processes of the Board. Congressman Hartley, jointly responsible with Senator Taft for the 1947 Labor Management Relations Act, left no doubt as to the meaning of 9(h) when he said:

" 'Lest there be any doubt as to what we meant when

we wrote that Section, I want to put down here exactly what I had in mind and also report that not a single member of the House Labor Committee or the Joint House-Senate Conference Committee ever indicated that it meant anything else.

"'I meant that no local union could petition for an election or file an unfair labor practice charge unless the officers of that local and the officers of the international union and the officers of whichever of the two major labor organizations the international was affiliated with, had filed non-Communist affidavits.' Hartley: 'Our New National Labor Policy', Funk & Wagnalls Company, page 162.'"

"From the wording of the statute, the construction placed upon it by the Board in its Regulation 102.13, its legislative history and the trend of the pertinent decisions, we are entirely satisfied that the Dant case was correctly decided. Therefore we hold that in this matter the Board was without jurisdiction to issue its complaint."

The U. S. Court of Appeals for the Fifth Circuit in *NLRB* v. *The American Thread Company* (198 F. (2d) 137), July 31, 1952, reached the same conclusion under similar facts. That Court said:

"In resisting enforcement of the order respondent urges that enforcement should be denied because at the time the original and amended charges were filed against it the Congress of Industrial Organizations had not complied with section 9(h) of the Act, 29 U. S. C. A. Sec. 159 (h) and that therefore the complaint issued on the basis of such charges was issued in violation of that section of the Act. The Congress of Industrial Organizations did comply with Section 9(h) supra, in December, 1949, before the complaint was issued. The respondent contends that such compliance did not have the retroactive effect of validating the charges or empowering the Board to entertain them, or to issue the complaint or order. NLRB v. Dant, 195 F. 2d 299.

"In NLRB v. Dant, *supra*, the Court of Appeals for the Ninth Circuit, under a similar factual situation,

held that a charge made by a labor organization at a time when the Congress of Industrial Organizations, of which it was an affiliate, was not in compliance with subsection (h) of section 9, *supra*, could not be made the predicate for the issuance of a complaint by the Board, although the Congress of Industrial Organizations complied with the requirements of that subsection prior to the date of issuance of the complaint. The Board contends that the decision is unprecedented and that this construction is contrary to a "spontaneous textual reading" of the statute. In NLRB v. Postex Cotton Mills, 181 F. 2d 919, this Court had occasion to consider the purpose of Congress in enacting the statute in question and concluded that it was with the intent to 'wholly eradicate and bar from leadership in the American Labor movement at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.'

"The Board argues that the statute should be construed to place a limitation upon its power to issue a complaint in cases where a charge has been filed by a non-complying labor organization and not to disqualify a non-complying labor organization from filing charges. But the broad purpose of the Act covers both situations. *The statute withdraws from its creature, the Board, the power to employ its processes in aid of a non-complying union, and likewise evidences the clear purpose to disentitle and exclude such non-complying union from setting in motion the processes of the Board.* Both of these results are necessary to insure complete effectuation of the Congressional intent. *Congress intended to remove from the protection of the Act those labor organizations which could not, or would not, bring themselves into compliance and thereby withheld from such organizations not only the processes of the Board, but also the benefits of the Act.* NLRB v. Postex Cotton Mills, supra; NLRB v. Case Co., 189 F. 2d 599. Inasmuch as the charges were filed at a time when the union was not in compliance and since the subsequent compliance had no retroactive effect to give legal substance to the charges, or empower the Board to issue the complaint, the order of the Board is un-

authorized and cannot be enforced. NLRB v. Dant, *supra*, and cases cited.". (Emphasis added).[20]

Within a few days after this Court granted the Board's Petition for a Writ of Certiorari in the case at bar, the United States Court of Appeals for the Sixth Circuit decided the case of *NLRB* v. *Tennessee Egg Company*, October 17, 1952 (.... F. 2d ...., 30 LRRM 2737). Consistent with the rulings of other Courts of Appeal, the Court of Appeal for the Sixth Circuit expressly ruled that Section 9(h) of the Act deprives the Board of Authority to in any way process a union charge filed at a time when the union was not in compliance with the filing requirements of the Act. That Court said:

> "*Subsections (f), (g) and (h) of section 159, Title 29, U.S.C.A., forbid investigation by the Board in any matter where there has been a failure by the complaining union to file* its constitution, by-laws; *and required* reports and *affidavits* showing that its officers are free from communistic party affiliation or belief." (Emphasis added).

It is significant, we submit, that as in the case at bar, the Board apparently advanced a "literal language" argument to sustain its contention that the requirements of Section 9(h) are met if the union is in compliance when the Board's *formal complaint* is issued, notwithstanding a non-compliance status when the union *charge* is filed with the Board. The Circuit Court of Appeals answered that argument as follows:

> "In reply to the 'literal language' argument of the Board against denial of enforcement of its order in the instant case, the doctrine of United States v. Amer. Trucking Ass'n, 310 U. S. 534, 543, should be applied. There, the Supreme Court said in effect, that, when-

[20] For additional decisions holding that compliance cannot be made retroactive, and validate a charge filed by a non-complying union, see *N. L. R. B.* v. *Clark Shoe Co.*, C. A. 1, (1951) 189 F. (2d) 731 at 732, and *N. L. R. B.* v. *J. I. Case Co.*, C. A. 8 (1951), 189 F. (2d) 599.

ever acceptance of the literal meaning of words in a statute leads to absurd or futile results plainly at variance with the policy of the legislation, courts should follow and apply the legislative purpose. *Here, the mere fact that the language of the Act simply denies the proeesses of the Labor Board to unions whose officers have failed to comply with section 9(h)* [29 U. S. C. A. 159(h)] does not indicate that a union, in a status of non-compliance when the acts of which it complains were committed by the employer, may retroactively cure the defect of its non-compliance status by filing the required affidavits at the time the aid of the Labor Board is invoked.

"The opinion of this court in National Labor Relations Board v. Mylan-Sparta Co., 166 F. 2d 485 [21 LRRM 2368] (C.A. 6), cited by the Board, is, in our opinion, of no aid to the decision in the present controversy: for, in that case, it was merely held that the Labor Management Relations Act of 1947 is prospective, not retroactive, in its effect." (Emphasis added).[21]

In the statements of this Court, and the statements of the various Circuit Courts of Appeal hereinabove quoted,

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[21] In *United States of America* v. *Anthony Valenti*, 106 F. Supp. 121, the United States District Court for the District of New Jersey, in a criminal case involving a union officer charged with wilfully falsifying a non-Communist affidavit, it was stated in part as follows:

"In order to have a clearer understanding of the picture one must understand that the form referred to in the indictment (Form NLRB-1081) was *required to be filed by officers of unions seeking aid* from the National Labor Relations Board under the provisions of the Taft-Hartley Act * * *

"It should be noted, that in adopting this Section, Congress * * * left no room, and afforded no occasion for speculation or conjecture, in reasonable minds, as to the sanctions, both criminal and civil, annexed to the statutory provisions.

"It must be borne in mind that the form filed here was not required of everyone or even anyone under threat of sanctions, either criminal or civil. It was a voluntary filing *on the part of those individuals who sought to place the unions they represented in a special class, and thereby secure the protection and administrative processes of the governmental agency, the National Labor Relations Board.*" (Emphasis added.)

there is no deviation from the proposition that Section 9(h), requires that non-Communist affidavits must be on file before a union may "invoke" the processes of the Board. There can be no question but that the filing of a charge is designed to invoke the processes of the Act; in fact, the filing of such a charge constitutes the first step of such processes. As this Court emphasized in the *Highland Park* decision, *supra, if the charge is invalid because of non-compliance, then all the processes are invalid, and any Board order is likewise invalid.*

This interpretation of Section 9(h) was adopted by the Ninth Circuit Court of Appeals in the instant case, and has since been adopted by other United States Courts of Appeal as hereinabove shown.

In view of the language of Section 9(h), its undisputed legislative history, the construction of the Section in the Rules and Regulations of the National Labor Relations Board, and the earlier decisions of this Court and of various Circuit Courts of Appeal, we submit that no other interpretation of Section 9(h) is warranted.

V

CONCLUSION

In conclusion, Respondents respectfully submit that the decision of the Court below should be affirmed for the reasons that:

(1) The Circuit Court of Appeals has properly construed the language of Section 9(h) in the instant case;

(2) The decision of the Circuit Court of Appeals is fully supported by the legislative history of Section 9(h);

(3) The Board's action in the instant case was unauthorized by the National Labor Relations Act, as amended, *supra,* and was taken in direct violation of the Administrative Procedure Act;

(4) The decision of the Court below conforms with the decision of this Court in the *Highland Park* case, *supra*, and is in complete harmony with decisions of other Courts of Appeal, and

(5) The questions raised by the case at bar have already been settled by this Court in its *Highland Park* decision, *supra*.

Respectfully submitted,

R. S. SMETHURST
R. S. HASLAM
Washington, D. C.

JOHN T. CASEY
R. E. KRIESIEN
CASEY, KRIESIEN & PALMER
Portland, Oregon
Counsel for Respondents

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

"SEC. 9. * * *

* * * * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to

authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * * *

"SEC. 10. * * *

* * * * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * *

* * * * * *

"(e) * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, Secs. 346 and 347).